UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN WITTES, SCOTT R. ANDERSON, and THE PROTECT DEMOCRACY PROJECT, INC., Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 1:19-cv-02823

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This case concerns two Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for records regarding the United States Department of Justice's ("DOJ") reasons for investigating and attempting to prosecute former FBI Deputy Director Andrew McCabe.

On August 26, 2019, *The New York Times* and *The Washington Post* published reports indicating that federal prosecutors were likely to indict Mr. McCabe on charges of lying to federal agents. These reports raise serious questions about the independence and integrity of the DOJ in this matter. Although Mr. McCabe was dismissed from the FBI after an Office of the Inspector General ("OIG") investigation concluded he'd lacked candor with his superiors and with investigators, the DOJ almost never seeks criminal charges in these circumstances, and the public record simply doesn't support the charges against Mr. McCabe.

One concerning possibility is that DOJ's decision to charge Mr. McCabe may have been encouraged or even directed by President Trump. Ever since Mr. McCabe oversaw the FBI's investigation into links between Russia and President Trump's 2016 presidential campaign, President Trump has engaged in a long-running public crusade against him. He called for Mr. McCabe to be fired, celebrated his dismissal, and has since repeatedly called for him to be criminally charged. Any involvement by President Trump in the DOJ's investigation of Mr. McCabe would violate longstanding DOJ norms of independence from the White House and the White House's own DOJ contacts policy, as well as raise serious constitutional questions. Likewise, a politically-motivated prosecution of the former Deputy Director of the FBI for his role in conducting a properly predicated criminal investigation has a chilling effect on other civil servants whose work the President might view as harmful to him personally. That is a threat to the fair and even-handed administration of the law, a pillar of democratic government.

Accordingly, days after the *Times* and *Post* reports were published, Plaintiffs Ben Wittes, the Editor-in-Chief of *Lawfare*, Scott Anderson, a Senior Editor and Counsel for *Lawfare*, and The Protect Democracy Project, Inc. submitted two FOIA requests to DOJ for records regarding the White House's involvement, if any, in the investigation of Mr. McCabe. Plaintiffs requested expedited processing of those requests, but DOJ denied expedited processing of the first request, and, after this suit was filed, denied having records responsive to the second request.

Meanwhile, news continues to break about the McCabe investigation. Reports published on September 12 indicate that the grand jury may well have refused to indict Mr. McCabe. On October 1, in another FOIA matter, Judge Reggie Walton ordered the government to either charge Mr. McCabe or drop its investigation by November 15. Judge Walton said he would start ordering the release of information if the government failed to do so, noting, "I think our society, our public does have a right to know what's going on."[1] Judge Walton further noted that the DOJ's failure to act on charges against Mr. McCabe is damaging the DOJ's credibility.

In order to inform the ongoing public debate about the propriety of any continued investigation of Mr. McCabe and have an opportunity to affect its outcome, it is critical that this Court enforce FOIA's mandates and require DOJ to respond to Plaintiffs' requests as soon as practicable and conduct an adequate search for records. Plaintiffs will be irreparably harmed in their respective missions to inform the public about and contribute to the public debate on a potentially grave act of government misconduct, if DOJ does not expeditiously respond to their requests.

[1] Spencer S. Hsu & Matt Zapotosky, *Judge to DOJ: Decide on Charging Andrew McCabe by Nov. 15, or Face Release of FBI Records*, Wash. Post (Oct. 1, 2019), https://www.washingtonpost.com/local/legal-issues/judge-to-doj-decide-on-charging-andrew-mccabe-by-nov-15-or-face-release-of-fbi-records/2019/10/01/3e169168-e3c4-11e9-a331-2df12d56a80b_story.html.

BACKGROUND

A. President Trump's Public Campaign Against Mr. McCabe

Andrew McCabe joined the FBI in 1996,[2] and became its Deputy Director in January 2016.[3] During his tenure as Deputy Director, Mr. McCabe oversaw the Russian interference investigation, and was one of the first FBI officials to question whether the Trump Campaign had colluded with Russia.[4] Later, Mr. McCabe oversaw the FBI's investigation into allegations that President Trump obstructed justice by, among other things, firing FBI Director James Comey. President Trump has repeatedly used highly public forums — most often his Twitter account and his campaign rallies — to attack Mr. McCabe's character and call for government action against him. President Trump has routinely identified Mr. McCabe as part of a "Witch Hunt"[5] against him and called for Mr. McCabe's dismissal from the FBI.[6] President Trump specifically encouraged denying Mr. McCabe his retirement benefits, tweeting "FBI Deputy Director Andrew McCabe is racing the clock to retire with full benefits. 90 days to go?!!!"[7] After the OIG report was issued, President Trump tweeted that Mr. McCabe had "LIED! LIED! LIED!"[8] and

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[2] FBI, *Andrew McCabe Named Deputy Director of the FBI*, FBI: News (Jan. 29, 2016), https://www.fbi.gov/news/pressrel/press-releases/andrew-mccabe-named-deputy-director-of-the-fbi.

[3] *Id.*

[4] *See, e.g.*, Washington Post Staff, *Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee*, Wash. Post (May 11, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/11/full-transcript-acting-fbi-director-mccabe-and-others-testify-before-the-senate-intelligence-committee/.

[5] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (May 20, 2018, 6:11 AM), https://twitter.com/realdonaldtrump/status/998189366844559360; Donald J. Trump (@realDonaldTrump), Twitter (June 28, 2018, 5:30 AM), https://twitter.com/realdonaldtrump/status/1012312287280074754.

[6] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:48 AM), https://twitter.com/realdonaldtrump/status/890207082926022656.

[7] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 23, 2017, 12:30 PM), https://twitter.com/realdonaldtrump/status/944666448185692166.

[8] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 13, 2018, 12:36 PM), https://twitter.com/realdonaldtrump/status/984877999718895616.

repeatedly questioned why DOJ wasn't conducting a criminal investigation.[9] President Trump later tweeted that Mr. McCabe had "committed many crimes"[10] and demanded that DOJ "look at" them.[11] He called Mr. McCabe "nasty,"[12] a "disgrace to the FBI and a disgrace to our Country"[13]; tweet-quoted FOX News's Sean Hannity's accusation that Mr. McCabe was "plotting a coup (government overthrow)"[14]; accused Mr. McCabe of "treason"[15]; and called him "a terrible, terrible guy"[16] and a "major sleazebag."[17] And President Trump has insisted that the "real Collusion" with Russia was by Mr. McCabe, the Democratic National Committee, Hillary Clinton, and others.[18] All told, between October 2016 and July 2019, President Trump attacked Mr. McCabe publicly on fifty-one occasions. *See* Langford Decl. Ex. A.

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[9] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (May 18, 2018, 6:38 AM), https://twitter.com/realdonaldtrump/status/997471413266247681.

[10] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 16, 2018, 5:25 AM), https://twitter.com/realdonaldtrump/status/985856662866202624.

[11] *See, e.g.*, Factbase Videos, *Interview: Donald Trump Calls in to Fox and Friends for an Interview -April 26, 2018*, YouTube (Apr. 26, 2018), https://www.youtube.com/watch?v=5OjyHhz3_BM&feature=youtu.be&t=1697.

[12] *See, e.g.*, Factbase Videos, *Speech: Donald Trump Addresses Ohio Republican Party State Dinner - August 24, 2018*, YouTube (Aug. 24, 2018), https://www.youtube.com/watch?v=6X9VTsiG124&feature=youtu.be&t=2811.

[13] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 14, 2019, 6:55 AM), https://twitter.com/realdonaldtrump/status/1096060280839307267.

[14] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 18, 2019, 6:53 PM), https://twitter.com/realdonaldtrump/status/1097690731882446849.

[15] Wash. Post, *Trump Suggests Former FBI Officials Committed Treason*, YouTube (May 23, 2019), https://www.youtube.com/watch?v=dfhXL7Tma_s.

[16] Fox News, *Trump to Hannity: Democrats 'Fight a Dirtier Fight'*, YouTube (June 19, 2019), https://www.youtube.com/watch?v=1jCHVsOT8nQ&t=19m46s.

[17] Donald J. Trump (@realDonaldTrump), Twitter (July 13, 2019, 4:56 PM), https://twitter.com/realdonaldtrump/status/1150011125347627009.

[18] Donald J. Trump (@realDonaldTrump), Twitter (July 27, 2019, 8:49 PM), https://twitter.com/realdonaldtrump/status/1155324390793515008.

B. DOJ's Investigation Into Misconduct by Mr. McCabe and Mr. McCabe's Firing

It was against this backdrop that the DOJ's OIG opened an investigation of the FBI's conduct during the 2016 election.[19] On March 16, 2018, before OIG issued its report, then-Attorney General Jeff Sessions fired Mr. McCabe just 26 hours before his pension vested.[20] DOJ's firing of Mr. McCabe before the release of the OIG report, and for the apparent purpose of depriving him of his pension, was deemed highly unusual by various commentators, who noted that President Trump had been advocating for that exact result.[21] President Trump reacted by tweeting that it was a "great day for the hard working men and women of the FBI" and a "great day for Democracy."[22]

OIG's report, released on April 13, 2018, detailed four findings of misconduct against Mr. McCabe: a violation of the FBI's media policy for disclosures Mr. McCabe authorized prior to the election, and three separate instances of lack of candor for misleading statements to former

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[19] Office of the Inspector General, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* ("OIG Report"), U.S. Department of Justice (Apr. 13, 2018), *available at* https://oig.justice.gov/reports/2018/o20180413.pdf, at 1.

[20] Pete Williams, *Sessions Fires McCabe Before He Can Retire*, NBC News (Mar. 16, 2018), https://www.nbcnews.com/politics/justice-department/sessions-fires-mccabe-he-can-retire-n856751.

[21] *See e.g.*, Harry Litman, Opinion, *Why Andrew McCabe's Complaint About His Firing Is Likely to Prevail*, Wash. Post (Aug. 20, 2019), https://www.washingtonpost.com/opinions/2019/08/20/why-andrew-mccabes-complaint-about-his-firing-is-likely-prevail/; Ezra Klein, *Donald Trump's Corrupt Firing of Andrew McCabe*, Vox (Mar. 17, 2018), https://www.vox.com/policy-and-politics/2018/3/17/17133284/donald-trump-andrew-mccabe-jeff-sessions-fired-former-fbi-director.

[22] Jacqueline Thomsen, *Trump Takes a Victory Lap on McCabe Firing: "A Great Day for Democracy"*, The Hill (Mar. 17, 2018), https://thehill.com/homenews/administration/378903-trump-takes-victory-lap-on-mccabe-firing-a-great-day-for-democracy; Donald J. Trump (@realDonaldTrump), Twitter (Mar. 16, 2018, 9:08 PM), https://twitter.com/realDonaldTrump/status/974859881827258369.

FBI Director James Comey and DOJ investigators.[23] OIG subsequently referred the matter for consideration of criminal charges.[24]

President Trump continued his attacks on Mr. McCabe even after the release of the OIG report and during the pendency of the criminal review. As recently as July 27, 2019, President Trump tweeted: "Why didn't Robert Mueller & his band of 18 Angry Democrats spend any time investigating Crooked Hillary Clinton, Lyin' & Leakin' James Comey, Lisa Page and her Psycho lover, Peter S, Andy McCabe, the beautiful Ohr family, Fusion GPS, and many more, including HIMSELF & Andrew W?"[25]

C. Reports Published in Late August Indicated That, Under Pressure from President Trump, DOJ Would Soon Indict Mr. McCabe

On August 26, 2019, *The New York Times* and *The Washington Post* reported that prosecutors were likely to indict Mr. McCabe on charges of lying to federal agents.[26] The reports detailed multiple irregularities about the investigation that led many, including Plaintiffs, to question whether the impending prosecution was politically motivated. It is extremely rare for DOJ to prosecute a federal official who has been terminated for misconduct, particularly for the

[23] Office of the Inspector General, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* ("OIG Report"), U.S. Department of Justice (Apr. 13, 2018), *available at* https://oig.justice.gov/reports/2018/o20180413.pdf, at 1–2.

[24] Pamela Brown & Laura Jarrett, *Justice Department Watchdog Sends McCabe Findings to Federal Prosecutors for Possible Criminal Charges*, CNN (Apr. 19, 2018), https://www.cnn.com/2018/04/19/politics/justice-mccabe-criminal-referral/index.html.

[25] Donald J. Trump (@realDonaldTrump), Twitter (July 24, 2019, 4:36 AM), https://twitter.com/realdonaldtrump/status/1153992334054440960?lang=en.

[26] Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html; Matt Zapotosky, *Justice Dept. Could Be Nearing Decision on Whether to Charge Andrew McCabe*, Wash. Post (Aug. 26, 2019), https://www.washingtonpost.com/national-security/justice-dept-could-be-nearing-decision-on-whether-to-charge-andrew-mccabe/2019/08/26/0e1a636c-c840-11e9-a1fe-ca46e8d573c0_story.html.

charge of making false statements in an internal investigation.[27] Indeed, Plaintiff Wittes culled recent OIG investigations and concluded that there are "countless" publicly available examples of government officials who engaged in similar conduct but did not face criminal investigation or prosecution.[28] Examples of OIG investigations that resulted in findings of misconduct but no criminal charges include:

- *Findings of Misconduct by a United States Marshal for Making an Inappropriate Comment about Shooting a Judge and for Lack of Candor*;
- *Findings of Misconduct by a DEA Assistant Special Agent in Charge for Failure to Act in a Professional Manner, and by a DEA Special Agent in Charge for Favoritism and Providing False Statements to the OIG Concerning the Allegations Involving the ASAC*;
- *Findings of Misconduct by a Senior DOJ Official for Ethical Misconduct, Sexual Harassment, Sexual Assault, and Lack of Candor to the OIG*;
- *Findings of Misconduct by an FBI Official for Accepting Gifts From Members of the Media and for Lack of Candor*;
- *Findings of Misconduct by an FBI Special Agent for Receiving Gifts from a Former FBI Confidential Human Source, Using the Source After Deactivation, Protecting the Source and the Source's Illegal Business, Misusing FBI Assets for Personal Gain, Lack of Candor, and Computer Security Policy Violations*;
- *Findings of Misconduct by an FBI Special Agent for Contacting Witnesses for an Improper Purpose, Divulging Law Enforcement Sensitive Information to Unauthorized Individuals, Providing Misleading Testimony, Providing False Information to the OIG, Mishandling Classified Information, and Misusing Government Devices and his Position*;

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[27] *See* Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html; Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe.

[28] *Id.*

- *Findings Concerning Misconduct by a U.S. Attorney for Having an Inappropriate Relationship with a Subordinate, Attempting to Influence or Impede an OIG Investigation, and Other Misconduct*;

- *Findings of Misconduct by an FBI Assistant Special Agent in Charge For Submitting False Travel Vouchers, Lacking Candor, and Other Misconduct In Connection With His Relocation*;

- *Findings of Misconduct by an AUSA for Improperly Receiving, Viewing, Copying, and Sharing Personally Identifiable Information of Coworkers, and Lacking Candor with Supervisors*;

- *Findings of Misconduct by an FBI Unit Chief, Including Acceptance of Gifts from Vendors, Giving Preferential Treatment, and Misuse of Position*; and

- *Findings Concerning a DOJ Attorney Who Sent Harassing E-mails to Government Employees and Lacked Candor with the OIG*.[29]

More anomalous still, the investigation into Mr. McCabe dragged on for so long that the grand jury term expired, and two of the lead prosecutors assigned to Mr. McCabe's case left the DOJ in the middle of the investigation.[30] While the prosecutors have declined to comment on the investigation, one was reportedly "unhappy with the lengthy decision-making process."[31]

D. Plaintiffs' FOIA Requests and Defendant's Response

On September 3, 2019, Plaintiffs sent a FOIA request (the "First Request") to Defendant, seeking records that would inform the public debate about the White House's involvement, if any, in the investigation of and decision whether to indict Mr. McCabe. Langford Decl. Ex. B. Specifically, Plaintiffs requested the following records:

> (a) Records of, reflecting, or referencing any communications between President Trump and any individual(s) at the

[29] *Id.*; *see id.* (providing links to the underlying findings).

[30] Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times(Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html.

[31] *Id.*

> Department of Justice regarding Andrew Mr. McCabe, which records also contain any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.
>
> (b) Records of, reflecting, or referencing any communications between White House personnel and any individual(s) at the Department of Justice regarding Andrew Mr. McCabe, which records also contain any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.
>
> (c) Any emails, memorandum, and other written correspondence from, to, or copying Attorney General William Barr and/or Deputy Attorney General Jeffrey Rosen referencing (a) "Trump," "President," "POTUS," and/or "White House" and (b) "Mr. McCabe," which correspondence also contains any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.

Id. at 1. The First Request specified that Plaintiffs seek records "from March 16, 2018 to the present." *Id.*

As Plaintiffs explained in their FOIA request, Plaintiffs are well-positioned to publish any responsive records and ensure that they reach the public. Plaintiff Benjamin Wittes is the Editor-in-Chief of *Lawfare*, an online publication published by The Lawfare Institute, a 501(c)(3) not-for-profit educational organization. *Id.* at 4 & n.9. Lawfare is dedicated to informing public understanding on the operations and activities of the federal government. *Id.* at 4. Plaintiff Scott R. Anderson is a Senior Editor and Counsel of *Lawfare* and Fellow in Governance Studies at the Brookings Institution. *Id.*[32] Plaintiff Protect Democracy is a non-partisan not-for-profit organization that operates in Washington, D.C., and is engaged in disseminating newsworthy information and analysis. *Id.*[33] Plaintiffs explained that they intend to

[32] *See also* Decl. of Benjamin Wittes in Supp. of Pls.' Mot. for a Prelim. Inj. ¶¶ 1–13 (Oct. 10, 2019).

[33] *See also* Decl. of Ian Bassin in Supp. of Pls.' Mot. for a Prelim. Inj. ¶¶ 2–9 (Oct. 10, 2019).

make public any records obtained through the First Request and provide information about and analysis of the records as appropriate on *Lawfare*'s website (www.lawfareblog.com) and Protect Democracy's website (www.protectdemocracy.org). *Id.*

On September 6, 2019, Plaintiffs Wittes and Anderson sent another FOIA request (the "Second Request") to Defendant, homing in on a specific subset of the records they initially requested and defining a different date range for that subset of records. Langford Decl. Ex. C. Specifically, Plaintiffs Wittes and Anderson requested "[a]ny e-mail messages from Matthew Whitaker received by Christopher Ott, George Toscas, or Adam Hickey making reference to Andrew Mr. McCabe in the period from March 1, 2018, to March 31, 2018." *Id.* at 1. If such an email exists, it could indicate that high-level DOJ officials intended to prosecute Mr. McCabe regardless of DOJ OIG's findings.

For both the FOIA requests, Plaintiffs requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and DOJ-specific regulations. Langford Decl. Ex. B at 2–5; Langford Decl. Ex. C at 2–3. On September 13, 2019, Defendant denied expedited processing for Plaintiffs' First Request. Langford Decl. Ex. D at 1. Defendant failed to respond to Plaintiffs' request for expedited processing of their Second Request within ten calendar days. Accordingly, Plaintiffs filed this suit on September 20, 2019.

On September 30, 2019, after Plaintiffs filed suit, DOJ issued a final decision in response to Plaintiffs' Second Request. Langford Decl. Ex. E. DOJ "advised that a search has been conducted in the Office of the Attorney General, and no records responsive to [Plaintiffs' Second Request] were located." *Id.* at 1.

E. Developments After Plaintiffs Submitted Their Requests

After Plaintiffs filed their requests, the *Times* and *Post* reported that the United States Attorney's Office had rejected Mr. McCabe's final attempt to convince them not to indict him.[34] But although the federal grand jury investigating Mr. McCabe "was suddenly recalled," in mid-September, no true bill has been reported and the USAO has not announced that it is closing the case.[35] If the grand jury rejected the charges against Mr. McCabe, a decision by the USAO to present the case to a new grand jury would be a highly unusual action that would raise further concerns that DOJ is pursuing the prosecution at the President's behest.[36]

Late on September 12, 2019, Mr. McCabe's lawyers sent an email to the U.S. Attorney for the District of Columbia explaining that they'd heard rumors that the grand jury returned a "no-bill" against Mr. McCabe, urging the prosecutors to ask for the grand jury to submit a report to the magistrate judge reflecting its lack of concurrence, and reminding the government of DOJ procedures governing the resubmission of a case to a grand jury. Langford Decl. Ex. F. On September 13, 2019, *The New York Times* published its own report concerning the mysterious absence of public charges following the grand jury's dismissal, observing weaknesses in the case and describing it as "politically fraught for the Justice Department because of President Trump's repeated attacks on Mr. McCabe."[37] On September 19, 2019, Mr. McCabe's lawyers published a

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[34] *See* Matt Zapotosky & Spencer S. Hsu, *Justice Department Authorized Prosecutors to Charge Andrew McCabe*, Wash. Post (Sept. 12, 2019), https://www.washingtonpost.com/national-security/justice-dept-authorized-prosecutors-to-charge-andrew-mccabe/2019/09/12/5b0d48ea-d418-11e9-9343-40db57cf6abd_story.html; Eileen Sullivan & Adam Goldman, *Andrew McCabe Asks Justice Department Whether Grand Jury Rejected Charges*, N.Y. Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/us/politics/andrew-mccabe-grand-jury.html.

[35] *See* Zapotosky & Hsu, *id*.

[36] *See* Randall D. Eliason, Opinion, *If the Andrew McCabe Grand Jury Refused to Indict, It's a Big Deal*, Wash. Post, (Sept. 13, 2019), https://www.washingtonpost.com/opinions/2019/09/14/if-andrew-mccabe-grand-jury-refused-indict-its-big-deal/.

[37] Adam Goldman & Kate Benner, *Justice Dept. Rejects Andrew McCabe's Bid to Avoid Charges*, N.Y. Times (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/us/politics/andrew-mccabe-fbi.html?.

statement detailing DOJ's refusal to respond to their repeated inquiries about the status of the investigation. Langford Decl. Ex. G. As the Editorial Board of *The Washington Post* observed, the mysterious absence of public charges against Mr. McCabe after the grand jury's dismissal and the DOJ's stonewalling of Mr. McCabe's counsel only further indicated that the prosecution of Mr. McCabe is politically motivated rather than factually substantiated.[38]

On October 1, 2019, Judge Reggie Walton told prosecutors that they must either charge Mr. McCabe or drop their investigation by November 15.[39] In doing so, he expressed "dismay" at the government's delay in charging Mr. McCabe.[40] And he told prosecutors that if they fail to make a decision by November 15, he will begin ordering the release of FBI documents detailing the investigation into Mr. McCabe because "our society, our public does have a right to know what's going on."[41]

News of Mr. McCabe's potential indictment and possible grand jury no-bill has received national media coverage.[42] Much of that coverage has raised the possibility that the prosecution

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[38] Editorial Board, *The Case Against Andrew McCabe Looks a Lot Like Political Vengeance*, Wash. Post (Sept. 25, 2019), https://www.washingtonpost.com/opinions/andrew-mccabe-has-been-punished-enough/2019/09/25/4c242ba2-de43-11e9-b199-f638bf2c340f_story.html.

[39] Spencer S. Hsu & Matt Zapotsky, *Judge to DOJ: Decide on Charging Andrew McCabe by Nov. 15, or Face Release of FBI Records*, Wash. Post (Oct. 1, 2019), https://www.washingtonpost.com/local/legal-issues/judge-to-doj-decide-on-charging-andrew-mccabe-by-nov-15-or-face-release-of-fbi-records/2019/10/01/3e169168-e3c4-11e9-a331-2df12d56a80b_story.html.

[40] *Id.*

[41] *Id.*

[42] *See, e.g.*, Catherine Herridge, *Feds in Final Stages of Possible Prosecution Decision for McCabe: 'Target on His Back'*, Fox News (Aug. 26, 2019), https://www.foxnews.com/politics/feds-decision-mccabe; Chuck Ross, *Report: Feds Close to Deciding Whether to Indict CNN Analyst Andrew McCabe*, Daily Caller (Aug. 26, 2019), https://dailycaller.com/2019/08/26/andrew-mccabe-deciding-indictment-lying-fbi/; John Malcolm, *What an Indictment of Andrew McCabe Would Mean*, Heritage Found. (Sept. 3, 2019), https://www.heritage.org/crime-and-justice/commentary/what-indictment-andrew-mccabe-would-mean; *see* Matt Zapotosky & Spencer S. Hsu, *Justice Department Authorized Prosecutors to Charge Andrew McCabe*, Wash. Post, (September 12, 2019), https://www.washingtonpost.com/national-security/justice-dept-authorized-prosecutors-to-charge-andrew-mccabe/2019/09/12/5b0d48ea-d418-11e9-9343-40db57cf6abd_story.html; Eileen Sullivan & Adam Goldman, *Andrew McCabe Asks Justice Department Whether Grand Jury Rejected Charges*, N.Y. Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/us/politics/andrew-mccabe-grand-jury.html.

is politically motivated and influenced by President Trump.[43] This news has, in turn, profoundly concerned civil servants, who fear retaliation for doing their duty in any way that negatively affects the President.[44]

* * *

Plaintiffs now seek a preliminary injunction requiring DOJ to (a) grant their request for expedited processing with respect to their First Request; and (b) expeditiously conduct an adequate search for records responsive to their Second Request.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

Pursuant to the FOIA, this Court has jurisdiction to hear this matter and grant all necessary injunctive relief. 5 U.S.C. § 552(a)(4)(B); *see also U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). The statute provides for that same review to encompass an agency's "action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner

[43] *See, e.g.*, Sullivan & Adam Goldman, *Andrew McCabe Asks Justice Department Whether Grand Jury Rejected Charges*, N.Y. Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/13/us/politics/andrew-mccabe-grand-jury.html; Editorial Board, *The Case Against Andrew McCabe Looks a Lot Like Political Vengeance*, Wash. Post (Sept. 25, 2019), https://www.washingtonpost.com/opinions/andrew-mccabe-has-been-punished-enough/2019/09/25/4c242ba2-de43-11e9-b199-f638bf2c340f_story.html; Mike Levine & Alexander Mallin, *DOJ Rejects McCabe Appeal to Abandon Prosecution in Leak Investigation, Sources Say*, ABC News (Sept. 13, 2019), https://abcnews.go.com/Politics/doj-rejects-mccabe-appeal-abandon-prosecution-leak-investigation/story?id=65562760; Eric Tucker & Michael Balsamo, *Ex-FBI Official, Andrew McCabe, Faces Prospect of Criminal Charges*, PBS News Hour (Sept. 12, 2019), https://www.pbs.org/newshour/politics/ex-fbi-official-andrew-mccabe-faces-prospect-of-criminal-charges; *see also* Harry Litman, Opinion, *Andrew McCabe Will Be Fine, but the Rule of Law Is Taking a Big Hit*, L.A. Times (Mar. 19, 2018), https://www.latimes.com/opinion/op-ed/la-oe-litman-mccabe-mueller-firing-20180319-story.html.

[44] *See* Letter from Ian Bassin, Exec. Dir., Protect Democracy, et al. to Hon. Jerrold Nadler, Chairman, House Judiciary Comm. (Sept. 13, 2019), *available at* https://protectdemocracy.org/resource-library/document/letter-from-nffe-afl-cio-and-pd-urging-judiciary-committees-to-investigate-potential-wh-influence-on-prosecution-of-former-fbi-deputy-director-andrew-mccabe/.

to such a request shall be subject to judicial review under paragraph (4)." 5 U.S.C. § 552(a)(6)(E)(iii); *see also*, *e.g.*, *Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001).

A requester need not administratively appeal an agency's denial of expedited processing to file suit in court. This Court has held that because FOIA permits courts to entertain challenges to "[a]gency action to *deny or affirm denial* of a request for expedited processing," 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added), a requester need not administratively appeal a denial of expedited processing to file suit. *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) ("[P]laintiffs' failure to appeal the [agency]'s refusal to expedite their request does not preclude judicial review of the decision."). Therefore, the Plaintiffs' claim is ripe for adjudication.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiffs are entitled to a preliminary injunction, granting their request for expedited processing. In considering a request for a preliminary injunction, a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. *Al-Fayed*, 254 F.3d at 303. Here, all four factors weigh in favor of granting Plaintiffs' motion.

A. Plaintiffs Are Likely to Succeed on the Merits

1. Plaintiffs Are Entitled to Expedited Processing of The First Request

FOIA mandates that "[e]ach agency shall promulgate regulations . . . providing for expedited processing of requests for records" in cases of "compelling need" or "in other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i)(I)–(II). The statute defines "compelling

need" to include circumstances where a request is "made by a person primarily engaged in disseminating information," and there is "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(v)(II).

DOJ, in turn, has promulgated regulations providing for expedited processing of FOIA requests in four circumstances, 28 C.F.R. § 16.5(e)(1), two of which are relevant here. First, DOJ's regulations provide, as they must, for expedited processing whenever a request involves "[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information." 28 C.F.R. § 16.5(e)(1)(ii). Second, DOJ's regulations provide expedited processing whenever a request involves "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). Plaintiffs are entitled to expedited processing under both provisions.

a. Plaintiffs are "primarily engaged in disseminating information" and there is an "urgency to inform" the public regarding the government activities that are the subject of Plaintiffs' First Request.

Plaintiffs' First Request is entitled to expedited processing because it was "made by . . . person[s] . . . primarily engaged in disseminating information" and involves "[a]n urgency to inform the public about an actual or alleged Federal Government activity." 28 C.F.R. § 16.5(e)(1)(ii).

Plaintiffs are primarily engaged in disseminating information. To qualify as "primarily engaged in disseminating information to the public," "information dissemination" must "be the main and not merely an incidental activity of the requestor." *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 298 (D.D.C. 2017) (alteration omitted). Information dissemination, however, need not be the requester's sole occupation. *Id.*

This Court has already found that Protect Democracy "easily" qualifies as primarily engaged in disseminating information. *Id.*[45] That decision comports with other decisions holding that public-interest groups whose primary mission is to inform the public qualify. *See*, *e.g.*, *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Open Soc'y Justice Initiative v. CIA*, No. 19 Civ. 1329 (PAE), 2019 WL 3561889, at *3 (S.D.N.Y. Aug. 6, 2019).

Plaintiffs Wittes and Anderson are also "primarily engaged in disseminating information." "Courts regularly find that reporters and members of the media qualify," *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012), and DOJ's regulations implicitly assume that members of the news media meet the definition, *see* 28 C.F.R. § 16.5(e)(3) (requiring only "a requester who is not a full-time member of the news media" to demonstrate that their primary activity is information dissemination). As Wittes and Anderson represented to the DOJ, "Wittes is the co-founder and editor-in-chief of *Lawfare*," and "Anderson[] is a Senior Editor for *Lawfare*, where he has both authored and edited dozens of pieces." Langford Decl. Ex. B at 4.[46] They are both members of the news media and therefore primarily engaged in disseminating information to the public.

There is an urgency to inform the public about the potential political motivations behind the investigation and prosecution of Mr. McCabe. An "urgency to inform the public" exists where "(1) . . . the request concerns a matter of current exigency to the American public"

[45] Here, as in *Protect Democracy Project, Inc.*, Protect Democracy represented to the agency that "[i]t intends to disseminate the information obtained; it furthers its core mission by informing public understanding of the operations and activities of government . . . ; and it intends to give the public access to documents transmitted via FOIA on its website." Langford Decl. Ex. B at 4; *see Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 298; *see also* Decl. of Ian Bassin in Supp. of Pls.' Mot. for a Prelim. Inj. ¶¶ 2–9 (Oct. 10, 2019).

[46] *See also* Decl. of Benjamin Wittes in Supp. of Pls.' Mot. for a Prelim. Inj. ¶¶ 1–13 (Oct. 10, 2019).

(*i.e.*, the issues raised are "the subject of a currently unfolding story"); "(2) [] the consequences of delaying a response would compromise a significant recognized interest; and (3) [] the request concerns federal government activity." *Al-Fayed*, 254 F.3d at 310.[47] As the First Request undisputedly concerns federal government activity, only the first two factors are at issue and the request meets both.

DOJ's motivations for prosecuting Mr. McCabe are a matter of current exigency to the American public. At the time Plaintiffs submitted their requests, the public record indicated it was highly likely that prosecutors would indict Mr. McCabe on charges the government almost never pursues. *See* Langford Decl. Ex. B at 3 & nn. 2 & 8.[48] An indictment of a former top FBI official is extremely rare, particularly for the type of misconduct Mr. McCabe engaged in. *Id.* at 3 & n.4.[49] The only clear difference between Mr. McCabe's case and others where the government chose not to prosecute federal officials dismissed for similar misconduct is President Trump's long-term campaign against Mr. McCabe.[50] But any direct involvement by the White House in either the investigation or the decision whether to indict Mr. McCabe would likely

[47] DOJ's regulations add that "[t]he existence of numerous articles published on [the] subject" is evidence of an urgency to inform the public. *See* 28 C.F.R. § 16.5(e)(3).

[48] (citing Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html; Matt Zapotosky, *Justice Dept. Could Be Nearing Decision on Whether to Charge Andrew McCabe*, Wash. Post, (Aug. 26, 2019), https://www.washingtonpost.com/national-security/justice-dept-could-be-nearing-decision-on-whether-to-charge-andrew-mccabe/2019/08/26/0e1a636c-c840-11e9-a1fe-ca46e8d573c0_story.html).

[49] (citing Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html; Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe).

[50] *See* Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe.

violate longstanding DOJ norms and the White House's own policy, as well as raise serious constitutional questions, about which it is urgently necessary to inform the public.[51]

As noted above, since Plaintiffs filed their requests, the story has continued to develop. Media reports indicate that federal prosecutors told Mr. McCabe they were going to indict him and called in the grand jury, but no indictment was returned.[52] Mr. McCabe's counsel asked the U.S. Attorney's Office whether the grand jury had refused to indict Mr. McCabe and whether it would not close the investigation, Langford Decl. Ex. G, but the U.S. Attorney's Office has declined to respond.[53] And Judge Reggie Walton recently warned DOJ attorneys that he would begin releasing materials in a separate FOIA matter by November 15 if there was no decision whether to charge Mr. McCabe"[54]

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[51] Langford Decl. Ex. B at 3 & nn.5–7 (collecting sources). Specifically, Plaintiffs explained that Presidential administrations of both parties have, for forty years, adopted policies limiting communications with DOJ in order to ensure that the White House does not unconstitutionally interfere, or even appear to interfere, in party-specific matters. *See* Mem. from United to Protect Democracy to Interested Parties re: White House Communications with the DOJ and FBI (Mar. 8, 2017), *available at* https://protectdemocracy.org/resource-library/document/pd-memo-on-white-house-communications-with-doj/. This administration purported to follow course and adopted, at least on paper, its own policy limiting White House-DOJ communications on January 27, 2017. Mem. from Donald F. McGahn II, Counsel to the President, re: Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), *available at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000. Those policies help prevent a President from unlawfully using, or appearing to use, DOJ to retaliate against their critics or perceived political enemies, *see Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out . . . ."); *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Batchelder*, 442 U.S. 114 (1979); as well as to protect DOJ's independence and ensure that prosecutors comport with their ethical obligations, *see* Protect Democracy, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (Mar. 2018), *available at* https://assets.documentcloud.org/documents/4498818/2018-Protect-Democracy-No-Absolute-Right-to.pdf. Any evidence that the White House violated longstanding DOJ norms, its DOJ communications policy, or federal law in the investigation and decision whether to indict Mr. McCabe would raise serious concerns about which it is urgently necessary to inform the public.

[52] *See* Eileen Sullivan & Adam Goldman, *Andrew McCabe Asks Justice Department Whether Grand Jury Rejected Charges*, N.Y. Times (September 30, 2019), https://www.nytimes.com/2019/09/13/us/politics/andrew-mccabe-grand-jury.html.

[53] *Id.*

[54] *Id.*

Together, these developments demonstrate that knowing DOJ's motivations for prosecuting Mr. McCabe is a matter of current exigency to the public. The public needs to know now, one way or another, whether the President is animating the charges against Mr. McCabe before prosecutors indict or re-submit charges against Mr. McCabe to a new grand jury, before other civil servants are chilled by the DOJ's drawn-out investigation, and before the public loses faith in the DOJ's handling of Mr. McCabe's prosecution. For these reasons, Plaintiffs' First Request satisfies the first *Al-Fayed* factor.

As to the second factor—*i.e.*, whether delaying a response to Plaintiffs' First Request would compromise a significant recognized interest, "both Protect Democracy and the public at large will be 'precluded from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of' a high-profile government action," if production is unduly delayed. *Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 299 (quoting *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006)) (alterations omitted). Specifically, both Protect Democracy and the public will be precluded from obtaining information revealing the White House's involvement, if any, in the investigation of and attempt (or attempts) to indict Mr. McCabe.

Disclosure of the documents requested here would contribute significantly to the ongoing debate about the propriety of the investigation into Mr. McCabe and whether President Trump has abused his office. Any record reflecting the President's or the White House's involvement in the DOJ's decision to investigate and charge Mr. McCabe would profoundly alter the debate over Mr. McCabe's prosecution. Being "closed off" from these records and debates "is itself a harm in an open democracy." *Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 300; *see also Elec. Frontier Found. v. Office of Dir. of Nat. Intelligence*, No. C 07-5278, 2007 WL 4208311,

at *7 (N.D. Cal. Nov. 27, 2007) ("[O]ngoing public and congressional debates about issues of vital national importance cannot be restarted or wound back.") (internal quotations omitted).

Plaintiff Protect Democracy also needs the requested information for immediate use before it is too late. Protect Democracy currently has the urgent opportunity to publicize the records and possibly prevent further harm to Mr. McCabe and government institutions from the as yet unrealized possibility that prosecutors re-submit Mr. McCabe's case to a new grand jury and indict him for political reasons. Records reflecting any political involvement would support Protect Democracy's efforts to lobby Congress to take action,[55] and to prevent civil servants from being chilled by the spectre of politically motivated prosecutions. The value of the requested information is at its apex now, before Mr. McCabe is actually indicted and before the chilling effect has done additional damage to independent democratic government. *Cf. Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 300 (observing that the potential for additional military strikes without justification constitutes a separate and cognizable harm under the third *Al-Fayed* factor); *see generally Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("[S]tale information is of little value . . . .").

For these reasons, Plaintiffs' First request is entitled to expedited processing under FOIA's and the DOJ's "urgency to inform the public" provisions.

b. The requested materials would raise or dispel questions about the government's integrity that affect public confidence.

Plaintiffs' First Request also falls within DOJ's regulation providing for expedited processing of requests involving "[a] matter of widespread and exceptional media interest in

[55] *See, e.g.*, Letter from Ian Bassin, Exec. Dir., Protect Democracy, et al. to Hon. Jerrold Nadler, Chairman, House Judiciary Comm. (Sept. 13, 2019), *available at* https://protectdemocracy.org/resource-library/document/letter-from-nffe-afl-cio-and-pd-urging-judiciary-committees-to-investigate-potential-wh-influence-on-prosecution-of-former-fbi-deputy-director-andrew-mccabe/.

which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). As detailed above, the criminal investigation of Mr. McCabe and President Trump's long-running campaign against him have been the subject of widespread and exceptional media interest. *See supra* at pp. 6–9, 11–13 & nn. 26–43; *see ACLU*, 321 F. Supp. 2d at 32 (noting that a plaintiff may satisfy the widespread and exceptional media interest requirement by citing even a handful of articles, so long as they evidence an "ongoing national discussion").

As Plaintiffs explained in their First Request, the White House's potential involvement in specific-party enforcement matters also implicates integrity issues of the highest order. The Constitution's Take Care, Due Process, and Equal Protection Clauses, along with the First Amendment, limit the White House's ability to influence or interfere with specific prosecutions.[56] In addition, the White House's interference in specific prosecutions renders prosecutors conflicted, dividing their loyalties between the neutral pursuit of justice and the White House's own aims. It "calls into question the objectivity of those charged with bringing a defendant to judgment," and "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810–11 (1987) (internal citation omitted).

Moreover, numerous articles and op-eds have been published suggesting irregularities and impermissible motivations behind the investigation of Mr. McCabe, which further illustrates that the information Plaintiffs have requested implicates government integrity. For example, *The New York Times* reported that two prosecutors left the prosecution team, and that one was

[56] *See* Protect Democracy, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (Mar. 2018), *available at* https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/.

unhappy with the lengthy decision-making process.[57] That same article observed that "prosecutors could end up with jurors sympathetic to Mr. McCabe who believe that he, not the president, is the victim of a political witch hunt."[58] A *New York Times* op-ed by Quinta Jurecic acknowledged that, in light of President Trump's long-running campaign against Mr. McCabe, "it is impossible to completely wipe away the doubt about the integrity of the case against Mr. McCabe."[59]

Since Plaintiffs submitted their requests, a former federal prosecutor published an article in *Politico*, titled *The Weak and Risky Case Against Mr. McCabe: Is the President Pushing Prosecutors to File Charges They Can't Make Stick?*[60] It exhaustively details the evidentiary weaknesses of the government's case against Mr. McCabe, observes that "[i]t's hard to see how this case could meet usual Justice Department standards," and notes that "[i]t's easy to see at least one out of 12 jurors in the D.C. jury believing" "that the Trump administration set [Mr. McCabe] up and is targeting him due to Trump's vendetta against Mr. McCabe."[61] After the grand jury was reconvened and failed to indict Mr. McCabe, *The Washington Post*'s Editorial Board noted that, "[m]ore and more, the case against [Mr. McCabe] looks like an act of political vengeance, draining the already-depleted credibility of the Trump Justice Department."[62] The

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[57] Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html.

[58] *Id.*

[59] Quinta Jurecic, Opinion, *Will Trump Succeed in Prosecuting Andrew McCabe?*, N.Y. Times (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/opinion/andrew-mccabe-trump-fbi.html.

[60] Renato Mariotti, *The Weak and Risky Case Against McCabe: Is the President Pushing Prosecutors to File Charges They Can't Make Stick?*, Politico (Sept. 20, 2019), https://www.politico.com/magazine/story/2019/09/20/the-weak-and-risky-case-against-andrew-mccabe-228147.

[61] *Id.*

[62] Editorial Board, *The Case Against Andrew McCabe Looks a Lot Like Political Vengeance*, Wash. Post (Sept. 25, 2019), https://www.washingtonpost.com/opinions/andrew-mccabe-has-been-punished-enough/2019/09/25/4c242ba2-de43-11e9-b199-f638bf2c340f_story.html.

existence of these reports raising questions of integrity supports granting expedited processing under DOJ's integrity provision. *See ACLU*, 321 F. Supp. 2d at 32.

For these reasons, Plaintiffs' First Request is also entitled to expedited processing pursuant to DOJ's regulation providing for expedited processing of requests implicating the government's integrity.

2. Plaintiffs Are Entitled to Production or a Response "as Soon as Practicable"

Because Plaintiffs are entitled to expedited processing, the government must either produce the records Plaintiffs requested or justify its withholdings "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii).

Under ordinary circumstances, the government must respond to requests within 20 business days and "at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013). Upon making a determination about the scope of any production, an agency must "make the records 'promptly available,' which depending on the circumstances typically would mean within days or a few weeks of a 'determination,' not months or years." *Id.* at 188 (quoting 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)).

When a request is entitled to expedited processing, however, an agency must respond to the request and produce records much more quickly. FOIA provides that an agency must respond to a request within 10 calendar days and "process *as soon as practicable* any request for records to which the agency has granted expedited processing." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added), (a)(6)(E)(ii). This Court has construed FOIA to impose a rebuttable presumption that

records responsive to a request granted expedited processing be produced within twenty days. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 39.

Here, because Plaintiffs' First Request is entitled to expedited processing, DOJ must either produce responsive records or justify any withholdings "as soon as practicable," 5 U.S.C. § 552(a)(6)(E)(iii), and this Court should require it to do so *post haste*.

3. Defendant Either Failed to Conduct an Adequate Search for Records Responsive to Plaintiffs' Second Request or Are Inappropriately Invoking FOIA Exclusion (c)(1).

Plaintiffs are also likely to succeed on the merits of their claim that DOJ either conducted an inadequate search for records responsive to their Second Request or is inappropriately invoking FOIA's exclusion for law enforcement records. 5 U.S.C. § 552(c)(1).

Assuming DOJ is not invoking one of FOIA's exclusions, it has plainly failed to conduct an adequate search as required by FOIA. "An agency has an obligation under FOIA to conduct an adequate search for responsive records," and "[i]t is axiomatic that an inadequate search for records constitutes an improper withholding under FOIA." *Rodriguez v. Dep't of Def.*, 236 F. Supp. 3d 26, 34 (D.D.C. 2017) (internal quotation marks and alteration omitted). An adequate search generally requires an agency to conduct searches through "the places most likely to contain responsive materials" "which can reasonably be expected to uncover the records sought." *Id.* at 35. In other words, an agency must conduct a search that is "reasonably calculated to uncover all relevant documents." *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 97 (D.D.C. 2013) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

Plaintiffs' Second Request is so narrowly targeted to obtain specific documents reasonably believed to exist that any adequate search would have produced results. Although Plaintiffs do not yet know how DOJ conducted its search, it cannot have been reasonably

calculated to discover all responsive documents. At a minimum, the agency should have searched all email threads in which Mr. Ott, Mr. Toscas, and Mr. Hickey participated with Whitaker in the date range for threads containing the term, "McCabe." That is a simple search, and it should not have failed to turn up responsive records. *See id.* Plaintiffs note that it would plainly be insufficient to search only for emails from Acting Attorney General Whitaker's official email account, as it is well known that high-ranking public officials sometimes use multiple government email addresses and/or personal email accounts.[63] In addition, it would be insufficient to only search Whitaker's outgoing email messages for "McCabe," as he may not have personally referred to Mr. McCabe by his last name.

The only other explanation is that DOJ has in fact conducted an adequate search and located responsive records, but is refusing to disclose those records on the basis of FOIA's "exclusion" for certain law enforcement records. 5 U.S.C. § 552(c)(1).[64] That exclusion permits agencies to treat records as nonresponsive only where the disclosure of those records would interfere with an enforcement proceeding and "there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the *existence* of the records could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(c)(1) (emphasis added).

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[63] *See, e.g.*, Adam B. Lerner, *Holder, Hagel Used Alternate Emails*, Politico (Mar. 10, 2015), https://www.politico.com/story/2015/03/reports-eric-holder-chuck-hagel-alternate-emails-115963; Rachel Bade, *Top Clinton Adviser Sent 'Top Secret' Messages to Her Private Account*, Politico (Feb. 10, 2016), https://www.politico.com/story/2016/02/hillary-clinton-email-jake-sullivan-secret-219013.

[64] FOIA contains two other exclusions, neither of which are relevant here. FOIA's second exclusion permits agencies to treat as nonresponsive records that would reveal the identity of a confidential source. 5 U.S.C. § 552(c)(2). And its third exclusion permits the FBI to deny the existence of classified records pertaining to foreign intelligence or counterintelligence, or international terrorism. 5 U.S.C. § 552(c)(3). Any email from then-Chief of Staff to the Attorney General Whitaker to Mr. Ott, Mr. Toscas, or Mr. Hickey suggesting the investigation and/or prosecution of Mr. McCabe would not fall under either category.

But any invocation of FOIA's (c)(1) exclusion here would be improper. Mr. McCabe is certainly aware of the DOJ's investigation into him, as it has been the subject of repeated news reports and as his counsel has engaged in numerous consultations with the DOJ. *See supra* at pp. 6–9, 11–13 & nn. 26–43. Nor could the disclosure of the *existence* of one or more emails from Whitaker to Mr. Ott, Mr. Toscas, and/or Mr. Hickey reasonably be expected to interfere with enforcement proceedings. Disclosing that Mr. Whitaker sent such an email would not hinder the DOJ's efforts to investigate Mr. McCabe.

Moreover, as this Court explained in *Shapiro v. U.S. Dep't of Justice*, an agency may not rely on FOIA's exclusions to deny acknowledging the existence of records that are not themselves excludable, but which reference excludable information. 153 F. Supp. 3d 253, 270–76 (D.D.C. 2016). That is so even when acknowledging the existence of non-excludable records might "enabl[e] sophisticated requesters to infer the existence of [excludable] records." *Id.* at 271. The DOJ therefore cannot exclude responsive records here on the theory that an email from Mr. Whitaker, although not excludable itself, contains excludable information, like the existence of additional grounds for investigating Mr. McCabe.

In sum, Plaintiffs are likely to succeed on the merits with respect to the existence of records responsive to their Second Request. If DOJ conducted a search and failed to locate responsive records, it plainly conducted an inadequate search. If DOJ located responsive records but has invoked one of FOIA's exclusions, that invocation is improper both because Mr. McCabe is well aware of DOJ's investigation and because disclosing that then-Chief of Staff to the Attorney General Whitaker sent an email referencing Mr. McCabe in March 2018 would not interfere with that investigation.

B. Plaintiffs Will Be Irreparably Harmed Absent the Requested Relief

Plaintiffs will suffer irreparable harm to their efforts to shed light on a potential prosecution of Mr. McCabe absent expedited processing of their FOIA request. As explained earlier, by all indications, the criminal investigation of Mr. McCabe is ongoing and could lead to an indictment at any time. Adding to the urgency of Plaintiffs' request for information, recent media reports indicate that DOJ may have already sought an indictment that was rejected by a grand jury and may present the case to a new grand jury. *See supra* p.18 & n. 49. As noted, such an action would be highly irregular under DOJ policy and underscores the prospect that the investigation and possible prosecution of Mr. McCabe is improperly motivated.

Interference by the President in the DOJ's criminal charging decisions for the purpose of seeking to prosecute a civil servant who worked on matters adverse to the President is both a grave violation of his oath of office and a threat to all civil servants.[65] Plaintiffs therefore have an immediate interest in informing the public of the President's motives at the earliest possible time, and before — or as close as possible to — the time Mr. McCabe is indicted. If the production of the information is delayed, Plaintiffs and the public will lose their opportunity to influence and possibly prevent a dangerous and unlawful action by the DOJ.

Plaintiffs' case for a preliminary injunction is consistent with others in which this court has found irreparable harm from the government's denial of a request for expedited processing. "[T]he non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on*

[65] *See* Protect Democracy, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (Mar. 2018), *available at* https://assets.documentcloud.org/documents/4498818/2018-Protect-Democracy-No-Absolute-Right-to.pdf.

Election Integrity, 266 F. Supp. 3d 297, 319 (D.D.C. 2017). In a case involving the need for information on a "matter of current national debate" in advance of an "impending election," for example, this Court found that a plaintiff was irreparably harmed by not receiving expedited treatment of its request for information that would inform that public debate. *See Washington Post v. Dep't of Homeland Sec*., 459 F. Supp. 2d 61, 75 (D.D.C. 2006).

This Court found that an electronic privacy organization would likewise be irreparably harmed by missing out on information vital to an ongoing public debate on warrantless wiretaps. *See Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 41. And this Court also recently held that an escalation in hostilities between the United States and Syria made it likely that irreparable harm would result from delayed processing of the Plaintiffs' request for the government's rationale for the use of military force. *Protect Democracy Project, Inc.*, 263 F. Supp. 3d 293. "Again, the potential for irreparable harm under these circumstances exists 'because ongoing public and congressional debates about issues of vital national importance cannot be restarted or wound back.'" *Id.* at 301 (quoting *Elec. Frontier Found.,* 2007 WL 4208311, at *7).

The circumstances surrounding Plaintiffs' request are analogous to those cases. Plaintiffs are seeking information on a "highly public matter" in advance of an impending indictment, and in a situation where stale information will severely limit their ability to affect the government's decision by disseminating the requested information to the public. *See Payne Enters., Inc.*, 837 F.2d at 494 ("[S]tale information is of little value . . . .").

C. The Requested Relief Will Not Burden Others' Interests

If this court finds that Plaintiffs are likely to succeed on their claimed entitlements to expedited processing under the statute and an adequate search, there is necessarily no burden on others' interests. Even to the extent that there is a burden to others awaiting processing of FOIA requests, it is one imposed by Congress, which is the proper place for concerns to be addressed.

See *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (recognizing "an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate"); *see also Elec. Frontier Found.*, 2007 WL 4208311, at *7 (citing *Fiduccia v. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999)) ("any complaints about the burdens of complying with the law are best addressed to Congress, not the courts.").

D. The Public Interest Favors the Requested Relief

The public interest strongly favors injunctive relief. The D.C. Circuit recognizes "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth.*, 556 F.2d at 59. Expedited release of FOIA records promotes this element by "shed[ding] light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 42 (same); *see also Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C.1999) ("There is public benefit in the release of information that adds to citizens' knowledge"). For those reasons, this Court has recognized that an agency's compliance with FOIA "is presumably always in the public interest." *Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 301.

In addition, the public interest prong weighs heavily in favor of disclosure when records would shed light on ongoing debates of substantial public interest that have garnered widespread media attention. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 42. Here, the public would benefit from participation in the ongoing debate surrounding the propriety of the continued investigation into Mr. McCabe and the President's own conduct. *See supra* pp. 16–20.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court immediately enjoin DOJ to grant their request for expedited processing of their First Request, quickly conduct an adequate search for records responsive to both of Plaintiffs' requests, and either produce any responsive records to the Plaintiffs or justify any withholdings as soon as practicable.

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Respectfully submitted,

THE PROTECT DEMOCRACY PROJECT, INC.

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